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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

95-172

In re Applications of)
RAINBOW BROADCASTING COMPANY) File Nos. BMPCT-910625KP
For Extension of Construction Permit) and BTCCT-911129KT
and for Consent to the Transfer of)
Control of the Permittee of)
Station WRBW(TV), Orlando, Florida)

TO: Roy J. Stewart, Chief
Mass Media Bureau

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REPLY TO RAINBOW RESPONSE

1. Press Broadcasting Company, Inc. ("Press") hereby replies to the "Response" filed by Rainbow Broadcasting Company ("Rainbow") relative to Press' "Supplement to Informal Objections" ("Supplement"). As has been the case with virtually all of Rainbow's submissions, its most recent Response, far from exculpating Rainbow, in fact provides further conclusive support for Press' position.

2. In its Supplement Press merely reviewed the history of this case -- including particularly the claims which Rainbow has made to the Commission -- and demonstrated that Rainbow's April 12, 1993 letter to the Commission not only failed to respond to the Commission's inquiry of March 22, 1993 ^{1/}, but instead tended to establish the correctness of the allegations which Press has been advancing for more than two years. If Press' discussion of the facts and/or the law was in any way flawed, Rainbow could and should have utilized its Response to so argue. But Rainbow did not. Rather, Rainbow's Response consists of incorrect procedural arguments, unwarranted attacks on

^{1/} The Commission's inquiry sought information concerning any efforts which Rainbow might have made since November 27, 1991, to construct its station. From Rainbow's response it may safely be understood that the correct answer to that inquiry is *NONE* -- that is, Rainbow has clearly indicated that it has done *NOTHING* toward construction of its station in the last 18 months.

Press, and a core substantive argument which apparently concedes the validity of Press' claims.

3. Procedurally, Rainbow persists in its bizarre claim that Press somehow has no standing here, Response at 2, and that Press' pleadings are somehow impermissible, Response at 1-2. But Press operates a television station in the Orlando marketplace, a station which would compete with Rainbow's station for audience and revenues. As such, Press plainly is a party in interest here. *E.g.*, *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).^{2/} Moreover, Press' objections to Rainbow's various applications have been filed pursuant to Section 73.3587 of the Commission's Rules, which authorizes any party to bring relevant information to the Commission's attention, without regard to, *inter alia*, the limitations imposed by Section 1.45 of the Commission's Rules. Thus, contrary to Rainbow's claims, Press' pleadings have clearly been permissible.

4. Rainbow also spends considerable energy attempting to depict Press' pleadings as an effort to prevent competition. Response at 2, 5. According to Rainbow, but for Press' pleadings Rainbow could have constructed and commenced operation. Response at 2-5. But the fact of the matter is that ***at NO time in the last three-four years (at least) has Rainbow been precluded from constructing, REGARDLESS of Press' pleadings.*** At *all* times Rainbow has had an outstanding construction permit and a transmitter site. Rainbow could have built its station in 1988, 1989, 1990, 1991, 1992, or at any time in the first four and one-half months of 1993. The mere pendency of Press' pleadings did not in any way undermine Rainbow's legal authority to construct. Thus, had Rainbow really wished to avoid any further delay in commencing operation, it need only have built the station at some point in the last several years.

5. Tellingly, Rainbow has not constructed. Even more tellingly, Rainbow again clearly

^{2/} The authority which supports Press' standing is overwhelming and irrefutable. Indeed, Rainbow itself seems to have relied on the same general authority when it challenged Press' channel exchange proposal during the period 1989-1991. *See, e.g.*, Rainbow's Petition for Reconsideration and Stay filed in connection with Press' application (File No. BMPCT-900413KI) for a license to cover its modified facilities. Rainbow's claim regarding Press' supposed lack of standing is therefore not only frivolous, but also disingenuous.

indicates in its Response that Rainbow, in its present organizational form, *cannot* construct.^{3/}

6. Rainbow cites several cases in a failing effort to suggest that the Commission might somehow ignore the serious questions which have been raised. None of those cases, however, featured the rash of damning evidence which is available here, including evidence of apparent misrepresentation by Rainbow to the Commission.^{4/} Indeed, only one of the cases cited by Rainbow involved a situation where a permittee was simultaneously seeking an extension of its permit and authority to assign the permit -- and in that case, the Commission *rejected* both the extension and the assignment applications and, in so doing, established a standard which requires rejection of Rainbow's applications. *See Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127, 69 R.R.2d 1318 (1991), *recon. denied*, 7 FCC Rcd 1752 (1992).

7. Thus, Rainbow's Response does not provide any basis for granting Rainbow the relief it seeks. To the contrary, it supports Press' position. Perhaps the most blatant -- and, in some ways, ironic -- illustration of this appears at Footnote 3 of Rainbow's Response. Recall that, in its 1991 applications for extension of its construction permit, Rainbow advised the Commission that it had not constructed the station theretofore because of some undescribed "dispute" concerning its tower site. In Rainbow's words,

[a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS).

Rainbow Application (File No. BMPCT-910125KE), Exhibit No. 1 at 2. In its Response Rainbow

^{3/} Of course, in its Response Rainbow fails to address the fact that, for some five years, Rainbow has repeatedly advised the Commission that Rainbow has been ready, willing and able, in its original organizational form, to construct. *See* Rainbow's responses to Paragraph 8 in the permit extension applications (FCC Forms 701 and 307) which Rainbow filed in 1988, 1989, 1990, and 1991. Rainbow also fails to explain why it is not now ready, willing and able to do so in its currently authorized organizational form.

^{4/} Rainbow returns to its patented refrain that Press is relying on speculation and surmise. Response at 4. Press invites the Commission to review Press' pleadings in detail, and particularly the attachments thereto. Those pleadings are amply supported by documentation, including the sworn statements of Rainbow's own principal and the findings and conclusions of a Federal judge. *See also* Paragraphs 7-8, *infra*.

now advises the Commission that

[t]hat ongoing litigation can have *no effect on . . . the availability* of [Rainbow's] transmitter site.

Response at 4, n. 3 (emphasis added).

8. We have therefore come full circle. In 1991, Rainbow attempted to blame its failure to construct on its litigation against its tower owner (litigation, it bears repeating, which Rainbow itself initiated). Now, two years later, Rainbow has expressly acknowledged that that litigation is actually *immaterial* to Rainbow's ability to construct. *In effect, Rainbow has now conceded a misrepresentation which Press has been pointing out for more than two years.* This clearly underscores the propriety of dismissing or denying Rainbow's applications or, at a minimum, designating them for hearing to permit full inquiry into the facts and circumstances underlying Rainbow's conduct before the Commission.

Respectfully submitted

/s/

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May 21, 1993

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 21st day of May, 1993, I have caused copies of the foregoing "Reply to Rainbow Response" to be placed in the United States mail, first class postage prepaid, addressed to the following individuals:

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